No. ___

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

VINCENTE B. CHUIDIAN,

*Petitioner,*

vs.

PHILIPPINE EXPORT AND FOREIGN LOAN GUARANTEE CORPORATION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## QUESTIONS PRESENTED

I. IS THE ACT OF STATE DOCTRINE AVOIDED BECAUSE A FOREIGN GOVERNMENT SEEKS TO ADJUDICATE THE OFFICIAL ACTS OF A PREDECESSOR REGIME, TO REPUDIATE THE FOREIGN DEBT OF THAT REGIME?

II. DOES THE ACT OF STATE DOCTRINE ALLOW A COURT TO REQUEST ADVICE FROM THE DEPARTMENT OF STATE TO DETERMINE WHETHER TO APPLY THE DOCTRINE?[1/]

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1/ The parties to the proceeding below were Vicente B. Chuidian, Judgment Creditor and Petitioner, and Philippine Export and Foreign Loan Guarantee Corporation, movant in the California Superior Court and real party in interest in all petitions for writs in the California Court of Appeal and the California Supreme Court.

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**PETITION FOR A WRIT**

**OF CERTIORARI**

**TO THE SUPREME COURT OF**

**THE STATE OF CALIFORNIA**

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner Vicente B. Chuidian respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this proceeding on November 12, 1986.

## JUDGMENTS BELOW

The decisions of the California Supreme Court and California Court of Appeals refusing to apply the act of state doctrine, were in the form of summary denials of a petition for writ of prohibition and/or mandate and/or certiorari. (Appendix A-2, A-3 and A-4 hereto). The opinion of the trial court refusing to apply the act of state doctrine and setting a motion to vacate for evidentiary hearing appears in the form of the transcript of the hearing of June 17, 1986, Appendix A-1 hereto).

## JURISDICTION

The judgment of the California Court of Appeal denying Vicente Chuidian's petition for writ of prohibition and/or mandate and/or certiorari was entered on September 18 and 19, 1986. This judgment dissolved a stay granted petitioner by the same Court of Appeal, after the trial

court ruled on June 17, 1986, that the act of state doctrine did not preclude the trial court from hearing the motion to vacate of respondent Philguarantee Export and Foreign Loan Corporation (Philguarantee). The Supreme Court of California denied Vicente Chuidian's petition for review of the denial of the stay on November 12, 1986.

The jurisdiction of this court is invoked under 28 U.S.C. sec. 1257(3).

## PROVISIONS OF LAW INVOLVED

The Federal Commmon Law Act of State Doctrine

"The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, at 401 (1964).

## STATEMENT OF THE CASE

### A. STATEMENT OF FACTS

Petitioner, Vicente B. Chuidian, was founder of Dynetics, Inc. which was to become one of the largest and most prestigious independent semiconductor manufacturers in the Philippines and the world. In 1981, with the loan of monies guaranteed by the Philippine government through its agency, Philguarantee, petitioner initiated a corporate plan of vertical expansion, which involved establishing marketing and supply facilities the United States.

The success of petitioner's company attracted the interest of the Marcos government, which in characteristic fashion, moved to take over petitioner's business. This included calling a default on the loan guarantee on the pretext that some of the loan monies had been invested outside the Philippines. In May, 1985,

the Philippine government seized control of Dynetics and its affiliates in the Philippines, approved the establishment of a new marketing arm in the United States, effectively destroying the business of petitioner's U.S. companies, and then filed this suit against petitioner, his U.S. Companies and the ex-President of Philguarantee.

At about the same time, petitioner filed suit against a number of Philguarantee officials and others responsible for unlawfully seizing Dynetics and destroying his U.S. businesses. This suit sought substantial damages in the hundreds of millions of dollars.

Faced with embarassing discovery and litigation in the U.S. Courts, and the likelihood of a huge adverse verdict, the Marcos government decided to settle both actions.

The settlement agreement with Philguarantee turned over control of Dynetics and its former U.S. marketing arm to Philguarantee, required covenants on the part of petitioner and provided for payment of compensation to him over a five year term. The agreement, as officially authorized by the Marcos government of the Philippines, was filed as a stipulated judgment in this action on December 17, 1985. Petitioner turned over his stock and the Marcos government began payment.

Acting under orders of the "Good Government Commission" of the new "Aquino government" of the Philippines, Philguarantee, on May 20, 1986, moved to vacate the stipulated judgment on the grounds that it resulted from "fraud" and "duress" exercised by petitioner Vicente Chuidian, through the threatened disclosure in the litigation of matters

politically embarassing to President Marcos.

B. HOW FEDERAL QUESTION IS PRESENTED

The trial court invited and received briefs from the parties addressing the question whether the federal act of state doctrine bars evidentiary hearing of the motion to vacate. It then ruled, on June 17, 1986, that the act of state doctrine does not bar an evidentiary hearing to examine the claim that the Philippine government entered the stipulated judgment because of the fear of political embarassment. The trial judge declared:

> "I HAVE REVIEWED YOUR ARGUMENTS WITH REGARD TO THE ACT OF STATE DOCTRINE AND TO THE EXTENT IT MIGHT PRECLUDE THE COURT INQUIRING INTO THE UNDERLYING FACTS THAT GAVE RISE TO THE STIPULATION."
>
> * * *
>
> "I DON'T BELIEVE THE ACT OF STATE DOCTRINE PRECLUDES THE COURT FROM CONSIDERING THOSE ISSUES IN AS MUCH AS THE PHILIPPINE GOVERNMENT AT THIS TIME IS CONSENTING TO THAT AND ACTUALLY REQUESTING THIS COURT TO VOID, IN

EFFECT, THE ACT OF THE PRIOR ADMINISTRATION."

Thereupon, the Trial Court set the motion to vacate for evidentiary hearing, which motion has been deferred pending further extensive discovery.

On August 6, 1986, petitioner sought from the California Court of Appeal, exclusively on the ground of the federal act of state doctrine, a stay of discovery proceedings and an extraordinary writ prohibiting a hearing on the motion to vacate. On the basis of this petition the Court of Appeal stayed proceedings on the motion to vacate on August 12, 1986, and asked for briefing on the act of state question raised by the petition.

Immediately thereafter, on August 13, 1986, the California Court of Appeal wrote to the United States Attorney General requesting foreign policy advice from the Executive Branch to determine whether to

apply the act of state doctrine. The Court of Appeal specifically asked:

> "To aid its determination as to the present applicability of the (act of state) doctrine, the court requests the United States government's position concerning the effect, if any, that inquiry into the circumstances surrounding the Chuidian-PEFLGC settlement agreement and stipulated judgment may have on its foreign relations and ability to conduct its foreign policy." (Appendix B hereto).

On September 18 and 19, 1986, after briefing of the question of application of the doctrine of act of state, but without disclosure of any response from the Executive Branch, the Court of Appeal dissolved the stay and summarily denied the petition for extraordinary writs. (Appendix, A-2 and A -3 hereto) On September 29, 1986, also on the sole ground of the federal act of state doctrine, a petition for review was filed with the Supreme Court of California.

That petition was summarily denied on November 12, 1986. (Appendix A-4 hereto.)

## REASONS FOR GRANTING THE WRIT

I.

## THE ACT OF STATE DOCTRINE SHOULD BAR ADJUDICATION OF THE MOTIVATION OF OFFICIAL ACTS OF THE MARCOS GOVERNMENT.

By ordering the evidentiary hearing, the California courts have ordered the adjudication of acts of state. The debt at issue in the proceedings below was created by official and public authorization of Philguarantee, as agency of the Philippine government, acting pursuant to official, formal and public instruction by the President of the Philippines.2/ It is the central theme of

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2/ Philguarantee was created by Presidential decree for the primary purpose of guaranteeing foreign loans granted to Philippine corporations to promote goals deemed to be in the Philippine national interest. (Presidential Decree No. 550, Exhibit

Philguarantee's complaint below that all appropriate officers and institutions of the Philippine government, for political reasons, knowingly participated in the negotiation of the settlement agreement. The evidentiary hearing ordered by the

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3 to Petition for Review in the California Supreme Court) The President of the Philippines in a official memorandum to this state agency (Exhibit 26G to Petition for Review in the California Supreme Court) outlined the parameters of the settlement agreement. That official agency, on November 22, 1985, by formal resolution recorded in its official minutes, authorized the settlement agreement; the agreement pursuant to this official authorization, was then executed by an authorized agent for Philguarantee. (Exhibit 26A to the Petition for Review in the California Supreme Court). The action of the President of the Philippines, in directing Philgurantee to enter into the settlement agreement, was officially, formally and publicly pursuant to his powers as President, and was specifically authorized by the law of the Philippines (Exhibit 21 to Petition for Review in the California Supreme Court).

California courts is directed solely at the question whether the President of the Philippines and Philguarantee undertook these acts of state in order to avoid political embarassment to the President of the Philippines.

The California courts have ruled in this case contrary to the federal cases. Following the application of the doctrine of act of state to bar the expropriation by a foreign state of property located in its territory in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), this Court has not had occasion to apply the act of state doctrine to a case not involving the taking of property, though it previously did so in Underhill v. Hernandez, 168 U.S. 250 (1897). However, the federal courts have often held, following the rationale of Sabbatino, that examination of the motivation of a foreign sovereign is barred by the act of state doctrine. When

the causal chain between the defendant's alleged conduct and the impact of the official act on the plaintiff cannot be determined without inquiry into the motives of a foreign sovereign, the act of state doctrine is generally applied and the claim dismissed. See, e.g., DeRoburt v. Gannet Co., Inc., 733 F.2d 701 (9th Cir. 1984) cert. denied, 469 U.S. 1159 (1985); Clayco v. Occidental Petroleum, 712 F.2d 404 (9th Cir. 1983); International Association of Machinists and Aerospace Workers. v. OPEC, 696 F.2d 1354, 1358 (9th Cir. 1981) cert. denied, 454 U.S. 1163 (1983); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978) cert. denied, 442 U.S. 928 (1979); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.) cert. denied, 409 U.S. 952 (1972). This

has been the result even where a foreign state or state agency is not named as a party. See, e.g., Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), cert. denied, 434 U.S. 984 (1978).

Some cases, though, assert that the act of state doctrine does not apply where private motivations pertain. See, e.g., Jiminez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962), cert. denied sub nom., 373 U.S. 914 (1963); Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 689 (S.D.N.Y. 1979). Primary reliance was placed on these cases in the opposition to petitioner's motion for a stay below.3/

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3/ See, e.g., "Answer to Petition for Review in the Supreme Court of California", pp. 19-20, and "Opposition to Petition for Extraordinary Writs in the Court of Appeal of California, Sixth Appellate District", pp. 16-17.

(Petitioner argued these cases are all inapplicable, because it is undisputed in record below, the Government of President Marcos, in authorizing the settlement agreement and stipulated judgment, acted publicly, and officially, employing all appropriate official procedures. See Fn.2, supra.

This Court has not directly addressed the pervasive and critical problem of defining when, if at all, the private interests of third parties or personal interests of foreign government officials may render the actions of officials not official acts of state, nor how that determination is to be made. Various approaches to defining an "act of state" have been tried by the federal courts.4/ However there has been no clarification of

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4/ Categorizations have included an exception to the act of state doctrine

the bearing of private motivation, and there is a high degree of inconsistency in the cases which consider this factor. Thus, for example, in Hunt v. Mobil Oil Corp., supra, it was held that the act of state doctrine barred judicial examination of an alleged private conspiracy of oil companies to cause the government of Libya to nationalize Hunt's Libyan interests; yet in Industrial Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48 (5th Cir. 1979), cert. denied 445 U.S. 903 (1980), the court held that the act of state

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for "ministerial" acts, Mannington Mills, Inc. v. Congoleum, Inc., 595 F.2d 1287, 1293-94 (3d Cir. 1979), application of the doctrine to bar judicial examination of sovereign decision-making processes, Hunt v. Mobil Oil Corp., 550 F.2d 68, 75-79 (2d Cir. 1977), cert. denied, 434 U.S. 984, and application of the doctrine to bar examination of government regulation of commerce within its own jurisdiction, Interamerican Refining Corp. v. Texaca Maracaibo, Inc., 307 F.Supp. 1291, 1298-99 (D.Del. 1970).

doctrine did not prevent examination of alleged wrongful procurement by private parties of government interference in marketing efforts. Moreover, the "commercial act" vs. "public act" distinction of Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) is of no assistance in elucidating the problem, since personal motivation can be involved in either commercial or public activity; as it is alleged here that the official governmental authorizations of the settlement agreement were the result of Marcos' personal political motivations.

The problem inevitably recurs, especially when there is a change in foreign government; but the conflict and fundamental uncertainty in the case law persists. The petition should be granted so that this omnipresent question of the relevance of personal interests to act of state analysis can be resolved.

II.

**CONSENT OF THE FOREIGN GOVERNMENT TO SUIT IN THE UNITED STATES SHOULD NOT BE ALLOWED TO ABROGATE THE ACT OF STATE DOCTRINE, WHERE ALLEGATIONS OF CORRUPT MOTIVATION OF A PREDECESSOR REGIME ARE BEING ASSERTED TO UNDERMINE FOREIGN DEBT**

As declared in Sabbatino, the act of state doctrine is not "compelled by the inherent nature of sovereign authority . . . or by some principle of international law.[5/] The sole rationale for the doctrine in United States jurisprudence is that it "arises out of the basic relationships between branches of government in a system of separation of powers." Id. at 423. Since the doctrine is in no sense based in any right of the foreign state, but has such "constitutional underpinnings", Id., the consent of the foreign state to

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5/ 376 U.S. at 398, 421.

adjudication in the United States is irrelevant to the analysis, and the act of state doctrine has been held to apply in cases where the foreign sovereign has consented to adjudication. See, e.g., DeRoburt v. Gannett Co., Inc. supra; Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438 (2d Cir. 1940). Accordingly, the Restatement of Foreign Relations Law declares as its leading proposition under the rubric, "Consent of foreign state to judicial scrutiny":

> SINCE THE ACT OF STATE DOCTRINE IS A JUDICIAL POLICY OF RESTRAINT, APPLICATION OF THE DOCTRINE CANNOT BE "WAIVED" BY THE FOREIGN STATE." Restatement of the Law, Foreign Relations Law of the United States, (Tentative Draft No. 7, Ch. 6., Sec. 469(e), p. 56).

The cases have applied the act of state doctrine where the claims to be examined are being made against a predecessor regime, so long as the acts at issue, when done, were official acts of

state. Thus, in Banco de Espana v. Federal Reserve Bank of New York, supra, it was held that the act of state doctrine barred suit against former officials of a deposed Spanish government for having diverted silver by means of illegal secret decrees, so long as they acted in official capacities. Also in Hatch v. Baez, 7 Hun. 596 (N.Y.Sup.Ct. 1876), it was held an action could not be brought against the former president of the Dominican Republic for acts done in his official capacity when he was President. The irrelevance of a change in government is also demonstrated in the case embodying this Court's classic statement of the act of state doctrine, Underhill v. Hernandez, supra.

The trial Court below held to the contrary, that consent of the foreign state to adjudication is dispositive. It stated as its reason for setting the

hearing concerning the political motivation of the Philippine government, that the act of state doctrine would not be violated by an evidentiary hearing, precisely because the present government of the Philippines seeks and consents to a factual determination concerning the motivation of its predecessor regime. See, p.9 , supra, and Appendix B.

Though the ruling of the trial court, now affirmed by the Supreme Court of California, certainly contravenes federal case law, it nevertheless provokes the basic question specifically left unresolved by Justice Harlan's opinion in Sabbatino, where he observed,

> "The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result, be measurably altered."[6]

This statement was indeed relied upon

below by Philguarantee in opposing the motion for a stay, both before the California Court of Appeals and the California Supreme Court.[7]

This case, however, presents a radical distinction from Justice Harlan's Bernstein reference, a distinction with enormous implications for the problem of third world debt. In Sabbatino, this court expressed the so-called "consensus theory" under which domestic courts may not adjudicate the legitimacy of foreign acts of state unless they violate international norms upon which there is international consensus.[8] Accordingly

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6/ 376 U.S. at 428.

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7/ "Answer to Petition for Review" in the California Supreme Court p. 18. "Opposition to Petition for Extraordinary Writs" in the Court of Appeal of the State of California, Sixth Apellate District, p. 14.

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Justice Harlan noted that a case such as Bernstein, challenging the validity of acts of confiscation performed by the government of Nazi Germany, acts contrary to the most compelling and universally acknowledged international norms, demonstrates when "the balance of relevant considerations may . . . be shifted" against insulation from examination by a United States Court. The present case does not involve alleged violations of international law. More importantly, the United States cannot wipe the slate clean with respect to its relations with the Philippines, as was required in the case of Nazi Germany. The debt being

8/ 376 U.S. at 428. The theory was apparently derived from the article cited at footnote 22 of the Sabbatino opinion, Falk, "Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino," 16 Rutgers L. Rev. 1 (1961).

repudiated was undertaken by a foreign regime that was an important ally of the United States for more than 20 years. The Marcos government was an ally with which the United States developed an immense body of important commercial and strategic relationships, relationships presently extant and vital.

The failure to apply the act of state doctrine here, because the successor regime is seeking adjudication by United States courts, invites wholesale repudiation of foreign debt undertaken by the Marcos government. The fact that the present government of the foreign state consents to adjudication in the United States does not eliminate the problem, but rather demonstrates and heightens it. For it is when governments are replaced that the most serious challenge to the security of international debt arises.

Philguarantee's claim that a

settlement agreement and letter of credit is invalid because it was infected by the personal political interest of President Marcos, is easily transferred to virtually any debt obligation undertaken by the Marcos government during the more than twenty years of Marcos rule. It is now public knowledge that Marcos' personal political motivations were involved in virtually every financial transaction of any significance, and the debt here at issue was undertaken through official procedures in no respect materially different from the procedures of any official undertaking of the government of the Philippines.

This case is the opening salvo on the significant body of foreign debt owed by the Philippines. If the act of state doctrine is not applied here, this entire body of obligations, now widely relied upon, becomes subject to attack in the

courts of the United States on the ground that personal political motivations of Marcos were involved. The failure to apply the act of state doctrine in this well-publicized case[9/] will stand as precedent for similar devastating impact on the obligations of governments of other nations owing substantial sums to United States interests.

In the context of recognition of foreign goverments, this court has firmly identified and supported the public policy here at issue. It stated in Guarantee Trust Co. v. United States, 304 U.S. 126 (1938), at 140-141:

> "If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yield-

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9/ (See, e.g., Exhibit 4-F of Petition for Stay in Court of Appeal of the State of California, Sixth Appellate District).

> ing none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affecting no protection to our own nationals in carrying them on."

The Second Circuit Court of Appeals has interpreted this statement, beyond the matter of recognition, as determinative in act of state analysis as well, citing it as the authority for its holding in Banco de Espana v. Federal Reserve Bank of New York, supra, that,

> "Persons who dealt with the former Spanish Government are entitled to rely on the finality and legality of that gvernment's acts, at least so far as concerns inquiry by the court of this country." Id. at 44.

The public policy interest in the security of international debt, requires articulation in act of state analysis by this Court. Justice Harlan explained in Sabbatino's particular context of expropriation that failure to apply the act of state doctrine "would be to render uncertain titles in foreign commerce, with

the possible consequence of altering the flow of international trade." 376 U.S. at 433. But the security of debt problem is far from resolved. The act of state doctrine should be applied in this case to make possible reliance on debt obligations of a foreign state or its agencies, without concern about claims of invalidity based on a foreign state's internal political intrigues.10/

The claim that the California courts below would adjudicate by evidentiary hearing, whether obligations of a foreign

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10/ Also in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976), this court recognized the centrality of the protection of international debt to act of state analysis. In Dunhill, though, the act of state doctrine was being asserted as a defence to payment of a commercial debt, not as the means to prevent repudiation as in the instant case. Also, in Dunhill this Court expressly found that official acts of state were not present. Id., at 698-99 Accordingly, it was held the doctrine of act of state was not a bar.

state can be vitiated by examination of the political motivations of foreign officials, raises the question of integrity of international debt in a most significant and dangerous contemporary manifestation. The ruling of this court is required to securely establish that the act of state doctrine prevents repudiation of foreign debt on political grounds by successor regimes.

III.

**THE COURTS MUST NOT DEPEND ON PERMISSION OF THE EXECUTIVE BRANCH IN DETERMINING WHETHER TO APPLY THE ACT OF STATE DOCTRINE**

The California Court of Appeals, to determine whether to apply the act of state doctrine, submitted on August 13 a request to the Department of State asking for the Executive Branch's position concerning the effect of adjudication on the foreign relations of the United States. (Appendix B hereto). The orders of the Court of Appeals denying

application of the act of state doctrine, were without statement of any reasons, leaving without disclosure any response from the Department of State. Whatever the response, however, the procedure employed violates the act of state doctrine.

It is apparent from Sabbatino and other cases, such as Dunhill, that the act of state doctrine, being concerned with the relation of the judicial function to the foreign relations prerogative of the Executive Branch, is a procedural as well as substantive principle articulating the separation of powers. It has been the rule, at least since the modern act of state doctrine was enunciated in Sabbatino, that the determination whether the doctrine applies is for the judiciary. While the Executive Branch has initiated occasional advice to the courts by way of the dubious "Bernstein exception" (See

infra, pp.32 and 33), there is no recognized precedent for the request for advice to be initiated by the Court itself.

Whatever the validity of the Bernstein exception, it should be clear that the procedure employed by the California Court of Appeals in this case, and validated by the order of the California Supreme Court, is fundamentally at odds with Sabbatino, and the rationale of the doctrine of act of state. The procedure is similar to the "reverse Bernstein" procedure that was rejected in Sabbatino, and should be rejected for the same reasons. At the evident urging of the Department of State, Sabbatino rejected the suggestion by the Bar of New York that the act of state doctrine should be applicable to violations of international law only "when the Executive Branch expressly stipulates that it does not wish the courts to pass

on the question of validity . . . .". 376 U.S. at 436. The reasons given were that the State Department would often prefer to avoid taking an official position, and that either the Court would be acting as the handmaiden of the Executive Branch or could embarass the Executive Branch. In either event, the values of separation of powers would be seriously compromised and undermined. The Executive Branch endorsed this view, and the Court reflected, "we should be slow to reject the representations of the Government that such a reversal of the Bernstein principle would work serious inroads on the maximum effectiveness of United States diplomacy". 376 U.S. at 398.

By initiating the involvement of the State Department the California Court of Appeal established a procedure significantly more destructive of the separation of powers rationale of the act

of state doctrine than either Bernstein or the proposed reverse Bernstein exception. The procedure employed here is more invidious, because it begins with a request by the Court for the advice of the Executive, thus requiring an abandonment of judicial independence at the very outset of the process. It also more certainly puts the Executive Branch on the spot, depriving the Executive Branch of any choice whether to involve itself in the act of state determination.

There is great need to clarify whether, and to what extent, Executive Branch advice may bear on the court's consideration of act of state questions, and whether the initiative for such advice may come from the courts, or exclusively from the Executive. Sabbatino voiced the serious problems created for the conduct of United States foreign policy when the Judicial and Executive Branches

communicate preliminary to a particular application of the act of state doctrine. However, in Sabbatino this court also expressly declined to rule on the so-called "Bernstein exception". 376 U.S. at 436. Though the matter of consultation of the judiciary with the Executive Branch was subsequently broached in First National City Bank v. Cuba, 406 U.S. 759 (1972), where a plurality disapproved the Bernstein exception, and was also addressed in Alfred Dunhill of London, Inc. v. Republic of Cuba, supra, there has not been a uniform instructive statement by this Court concerning either the weight or proper procedure to be accorded expressions of opinion by the Executive. Thus the California Court of Appeals knew no compunction about employing below, a procedure of solicitation of Executive Branch opinion wholly subversive of the rationale of the

act of state doctrine. The petition for certiorari should be granted because this is the appropriate case to articulate the crucial matter of the propriety and form of any instruction between the Judicial and Executive Branches in act of state cases.

## CONCLUSION

For the reasons presented above, this Court should grant Vicente B. Chuidian's petition for writ of certiorari.

DATED: February 6th, 1987.

Respectfully submitted,

PROFESSOR JACK I. GARVEY

CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY, WARTNICK, MOORE & HARRIS INC.

By: _____
LEE S. HARRIS
Attorneys for Petitioner

# APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

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|---|---|
| PHILIPPINE EXPERT AND FOREIGN LOAN GUARANTEE CORPORATION,<br><br>Plaintiff,<br><br>-vs-<br>ASIAN RELIABILITY COMPANY, INC.<br><br>Defendant. | NO.575867 |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JACK KOMAR

JUDGE OF THE SUPERIOR COURT

JUNE 17, 1986

MOTION

A P P E A R A N C E S

FOR THE PLAINTIFF KEVIN GOODWIN, ESQ.
CHRISTINE SHERRY, ESQ.

FOR THE DEFENDANT STEVEN FINLEY, ESQ.
VICENTE CHIUDIAN JACK GARVEY, ESQ.

SAN JOSE, CALIFORNIA JUNE 17 1986

P R O C E E D I N G S

THE COURT: PHILIPPINE EXPORT AND FOREIGN LOAN GUARANTEE VERSUS ASIAN RELIABILITY COMPANY.

MR. GOODWIN: KEVIN GODWIN, G-O-O-D-W-I-N APPEARING FOR OPPOSING PARTIES -- PARTY, PHILIPPINE EXPORT.

MS. SHARRY: ALSO FOR PHIL GUARANTEE.

MR. FINLEY: STEVEN FINLEY APPEARING FOR THE MOVING PARTY, VINCENTE CHUIDIAN.

MR. GARVEY: JACK GARVEY FOR MOVING PARTY, VICENTE CHUIDIAN.

THE COURT: ALL RIGHT. COUNSEL, I HAVE REVIEWED THE ADDITIONAL MATERIALS THAT WERE SUBMITTED TO ME FOLLOWING OUR LAST HEARING IN THIS MATTER.

I INDICATED TO YOU ON THE RECORD LAST TIME THAT I FELT THAT THE CONDITIONS PRECEDENT TO THE OBIGATION OF PHIL GUARANTEE HAD OCCURRED AND THAT ON THAT

BASIS PHIL GUARANTEE WOULD BE ENTITLED TO A WRIT OF EXECUTION --

MR. FINLEY: MR. CHUIDIAN YOU MEAN.

THE COURT: MR. CHUIDIAN WOULD BE ENTITLED TO A WRIT OF EXECUTION AGAINST PHIL GUARANTEE.

I ALSO INDICATED TO YOU THAT THE ISSUE THAT I WAS CONCERNED ABOUT WAS WHETHER OR NOT THE COURT HAD ANY BASIS FOR DENYING A WRIT OF EXECUTION BECAUSE OF SOME ALLEGED FRAUD IN CONNECTION WITH THE STIPULATED JUDGMENT.

I'VE REVIEWED OUR MATERIALS. I HAVE REVIEWED YOUR ARGUMENTS WITH REGARD TO THE ACT OF STATE DOCTRINE AND TO THE EXTENT IT MIGHT PRECLUDE THE COURT INQUIRING INTO THE UNDERLYING FACTS THAT GAVE RISE TO THE STIPULATION.

MY SENSE OF IT IS THIS -- AND I'M PARTICULARLY CONCERNED THAT THE MOTION THAT WAS SCHEDULED FOR THIS MORNING WAS TAKEN OFF CALENDAR.

BECAUSE IT SEEMS TO ME THAT BASED UPON THE ALLEGATIONS THAT ARE BEING MADE AT THE -- SOME OF THE EVIDENCE THAT YOU HAVE PRESENTED THAT THERE MAY WELL BE SOME BASIS FOR YOU TO ASSERT THAT THE -- THAT THE STIPULATED JUDGMENT OUGHT TO BE SET ASIDE.

YOU -- YOU CERTAINLY CAN STATE A CAUSE OF ACTION AS IT WERE.

THAT CAUSE OF ACTION IS NOT COERCION, HOWEVER, AND HAS NOTHING TO DO WITH EXTRINSIC FRAUD.

IT SEEMS TO ME THAT WHAT YOU ARE ALLEGING IS FRAUD BETWEEN MR. CHUIDIAN AND PRESIDENT MARCOS TO COMPEL A GOVERNMENT CORPORATION TO ENTER INTO A SETTLEMENT BASICALLY TO GIVE AWAY MONEY OUT OF THE TREASURY AND THAT IS CERTAINLY INTRINSIC FRAUD IF IT IS ANYTHING.

I DON'T BELIEVE THE ACT OF STATE DOCTRINE PRECLUDES THE COURT FROM CONSIDERING THOSE ISSUES IN AS MUCH AS THE

PHILIPPINE GOVERNMENT AT THIS TIME IS CONSENTING TO THAT AND ACTUALLY REQUESTING THIS COURT TO VOID, IN EFFECT, THE ACT OF THE PRIOR ADMINISTRATION.

AND I DON'T THINK THAT ANYTHING THAT HAS OCCURRED BETWEEN THAT GOVERNMENT AND THE UNITED STATES GOVERNMENT WOULD PRECLUDE THIS COURT FROM ENTERING INTO THAT INQUIRY.

BUT AT THIS POINT THERE IS NOTHING BEFORE THE COURT THAT WILL PERMIT THE COURT TO ENTER INTO THAT INQUIRY BECAUSE YOU HAVE WITHDRAWN YOUR REQUEST FOR RELIEF IN CONNECTION WITH THE MOTION TO SET ASIDE THE JUDGMENT BASED UPON THE FRAUDULENT STIPULATION.

NOW, I UNDERSTAND THAT YOU FELT YOU DIDN'T HAVE SUFFICIENT TIME TO GO FORWARD AND THAT THAT IS THE BASIC REASON THAT YOU WITHDRAW YOUR MOTION. THERE WAS NO REQUEST FOR A CONTINUANCE MADE OF THIS COURT.

THERE WAS NO EFFORT TO EXTEND THE TIME FOR THE CONCLUSION OF DISCOVERY.

AT THE TIME THAT THIS MATTER WAS ORIGINALLY SET FOR HEARING THIS MORNING WE TOLD YOU THAT THAT WAS ESSENTIALLY A DATE THAT WE HOPED DISCOVERY COULD BE COMPLETED BY AND WE SET IT ON A DISCOVERY SCHEDULE. WHEN YOU WERE UNABLE TO MEET THAT DISCOVERY SCHEDULE THERE WAS NO FURTHER REQUEST MADE OF THIS COURT.

THERE WERE PLENTY OF REQUESTS AND THERE WERE STATEMENTS AS TO WHY YOU COULDN'T MEET IT BUT NO REQUEST WAS MADE.

AND THE COURT WAS WAITING FOR THAT REQUEST AND NONE WAS MADE.

NOW, AT THIS POINT IN TIME, THEREFORE, IT'S MY INTENT TO GRANT THE WRIT OF EXECUTION. THERE IS NO LEGAL BASIS FOR NOT PERMITTING IT TO ISSUE.

ALL OF THE CONDITIONS PRECEDENT HAVE OCCURRED.

AND THERE IS NO JURISDICTIONAL BASIS

WHICH YOU HAVE ASSERTED IN YOUR PAPERS, ANY OF THE EVIDENCE THAT YOU PRESENTED THAT WOULD PERMIT THE COURT TO NOT DO THAT.

SO I'M GOING TO GRANT THAT WRIT.

NOW, THE THING I'M CONCERNED ABOUT IS YOUR APPLICATION FOR RELIEF BECAUSE YOU MAKE A SUBSTANTIAL ARGUMENT THAT OUGHT TO BE LITIGATED.

AND YOUR ADVICE TO THE COURT YOU DID NOT INTEND TO PROCEED WITH THIS MOTION THIS MORNING AND THAT YOU WISHED IT TO GO OFF CALENDAR IS A REQUEST TO THE COURT THAT THE COURT CAN GRANT OR DENY.

I DON'T INTEND TO PERMIT IT TO GO OFF CALENDAR.

I INTEND TO SET THIS MATTER FOR HEARING ON YOUR MOTION AND I'M GOING TO REQUIRE YOU TO GO FORWARD OR SHOW GOOD CAUSE WHY YOU SHOULD NOT GO FORWARD.

I AM GOING TO SET THIS MATTER FOR HEARING, THEREFORE. I AM GOING TO SET IT

IN SEPTEMBER.

AND I NEED A DATE IN SEPTEMBER.

A THURSDAY -- LAST TWO WEEKS OF SEPTEMBER.

THE CLERK: SEPTEMBER 10 OR 25TH --

THE COURT: SEPTEMBER 25, 1986, 9:00 A.M. FOR HEARING ON THE MOTION TO VACATE THE JUDGMENT.

IN THE MEANTIME THE WRIT ISSUES.

I EXPECT COUNSEL IF YOU DON'T WISH TO PROCEED WITH THIS MOTION AT THAT TIME TO ADVISE THE COURT WELL IN ADVANCE OF THAT TIME.

ALL PARTIES MAY ENGAGE IN DISCOVERY IN CONNECTION WITH THAT MOTION.

ALL RIGHT. THAT'S THE ORDER.

MS. SHERRY: YOUR HONOR, MAY I SAY SOMETHING WITH RESPECT TO THE REQUEST FOR EXTENSION OF TIME?

THE COURT: YES.

MS. SHERRY: I WOULD REFER YOUR HONOR TO OUR JUNE 6 CERTIFICATE OF COUNSEL

THAT WAS FILED IN CONNECTION WITH THE REQUEST TO TAKE OUR MOTION OFF CALENDAR WHICH SETS FORTH IN SOME DETAIL PRECISELY WHAT OUR EFFORTS WERE IN CONNECTION -- IF I MIGHT JUST ADD ONE OTHER THING.

MR. GOODWIN AND I WENT TO YOUR HONOR ON THE AFTERNOON OF JUNE 4TH, A WEDNESDAY, WITH DECLARATIONS ASKING YOUR HONOR TO CONSIDER THE PROBLEM WITH RESPECT TO THE DELAYS AND TELLING YOUR HONOR WE COULD NOT COMPLETE DISCOVERY WITHIN THE TIME PERIOD ALLOWED AS -- AS YOUR HONOR ACKNOWLEDGED.

AT THAT TIME YOUR HONOR DECLINED TO TAKE OUR DECLARATIONS AND TOLD US YOU WOULD NOT CONSIDER ANY REQUEST FOR EXTENSION OF TIME UNTIL AFTER -- UNTIL AFTER SUCH TIME AS YOU MADE A RULING ON THIS MOTION.

THE COURT: ON THE 9TH.

MS. SHERRY: ON THE 9TH. THAT'S RIGHT.

AND YOU SAID YOU WOULD NOT CONSIDER

ANY REQUEST UNTIL AFTER YOU MADE THE RULING ON THE JUNE 9TH MOTION.

MR. FINLEY THEN SPECIFICALLY ASKED THAT ANY DECISION WITH RESPECT TO EXTENSION OF TIME BE DEFERRED UNTIL THE TENTH AND YOU ORDERED WE WERE TO GIVE YOU A DATE CERTAIN ON THAT AFTERNOON FOR TWO DEPOSITIONS TO GO FORWARD THE NEXT DAY AT 5:00 P.M.

WE WERE UNABLE TO GIVE YOU AT THAT TIME A CERTAIN CONFIRMATION OF THAT AND WE TOLD MR. FINLEY THAT THERE WAS NO WAY THAT WE COULD PROCEED WITH DISCOVERY ON THE SCHEDULE THAT WAS REQUESTED.

SO WHAT WE DID IN TERMS OF THE JUNE 6TH CERTIFICATE OF COUNSEL IN TAKING THE MOTION OFF CALENDAR WAS NECESSITATED BY THE FACT WE COULD NOT GET A CONTINUANCE IN ADVANCE --

THE COURT: THAT WAS A CONCLUSION YOU REACHED, COUNSEL.

AND I DON'T THINK IT WAS WARRANTED BY

THE EVIDENCE AND WHAT HAD HAPPENED.

THERE IS NO QUESTION YOU HAD DISCOVERY PROBLEMS. BOTH PARTIES DID. BOTH PARTIES WERE UNABLE TO COMPLETE THEIR DISCOVERY.

BUT RATHER THAN WAITING UNTIL AFTER THE HEARING ON THE 9TH YOU TOOK THE MATTER -- OR TRIED TO TAKE THE MATTER OFF CALENDAR IN ADVANCE OF THAT DATE.

BE THAT AS IT MAY THE MATTER IS SET.

MS. SHERRY: THANK YOU.

MR. GOODWIN: THANK YOU, YOUR HONOR. IF --

MR. FINLEY: THANK YOU, YOUR HONOR.

MR. GOODWIN: COULD YOU DELAY THE ISSUANCE OF THE WRIT ITSELF UNTIL FRIDAY SO WE MAY CONTACT OUR CLIENTS IN THE PHILIPPINES ABOUT POSSIBLY POSTING A BOND? COULD YOU DO THAT?

THE COURT: I THINK THAT'S A REASONABLE REQUEST.

MR. GOODWIN: THANK YOU, YOUR HONOR.

THE COURT: THAT WOULD SATISFY, I'M

SURE, THE JUDGMENT CREDITOR.

MS. SHERRY: THANK YOU, YOUR HONOR.

MR. GOODWIN: THANK YOU.

STATE OF CALIFORNIA )

)

COUNTY OF SANTA CLARA )

I, HEATHER J. GORLEY, A CERTIFIED SHORTHAND REPORTER, IN AND FOR THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, DO HEREBY CERTIFY:

THAT THE FOREGOING PAGES CONTAIN A TRUE, FULL AND CORRECT TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE WITHIN-ENTITLED MATTER THAT WAS REPORTED BY ME AT THE TIME AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING AND THAT THE SAME IS A CORRECT TRANSCRIPT OF THE PROCEEDINGS.

DATED THIS 23RD DAY OF JUNE, 1986.

HEATHER J. GORLEY, CSR #5057

COURT OF APPEAL OF THE STATE OF CALIFORNIA

In and for the

SIXTH APPELLATE DISTRICT

| | | |
|---|---|---|
| VICENTE B. CHUIDIAN, | ) | NO. H002215 |
| | ) | |
| Petitioner, | ) | Superior Court #575867 |
| | ) | |
| -vs- | ) | |
| | ) | |
| SANTA CLARA COUNTY SUPERIOR COURT, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |
| PHILIPPINE EXPORT & FOREIGN LOAN, ETC., | ) | |
| | ) | |
| Real Party in Interest. | ) | |

BY THE COURT

To permit further consideration of the issues raised by the petition for writ of mandate and/or prohibition, all further proceedings in Santa Clara County Suerpior Court action number 575867, Philippine Export and Foreign Loan Guarantee Corporation v. Chuidian, et al., are

stayed until further order of this court.

The parties are notified that should it ultimately conclude that affirmative relief should be granted, this court will consider issuing a peremptory writ in the first instance. (See Palma v. U.S. Industrial Fasteners, Inc. (1982) 36 Cal.3d 171, 177-183.)

The court asks that real party in interest serve and file, on or before August 25, 1986, points and authorities in opposition.

(Agliano, P.J., Brauer, J., and Bonney, J. (assigned) participated in this decision.)

Dated: August 12, 1986 AGLIANO, P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

In and for the

SIXTH APPELLATE DISTRICT

| | | |
|---|---|---|
| VICENTE B. CHUIDIAN,<br><br>Petitioner,<br><br>-vs-<br><br>SANTA CLARA COUNTY SUPERIOR COURT,<br><br>Respondent.<br><br>PHILIPPINE EXPORT & FOREIGN LOAN,<br><br>Real Party in Interest. | ) | NO. H002215<br><br>Superior Court #575867 |

BY THE COURT

The petition for writ of certiorari is denied.

(Agliano, P.J., Brauer, J., and Bonney, J. (assigned) participated in this decision.)

Dated: September 19, 1986.
(Filed: September 19, 1986)

AGLIANO, P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

In and for the

SIXTH APPELLATE DISTRICT

| | | |
|---|---|---|
| VICENTE B. CHUIDIAN, | ) | NO. H002215 |
| | ) | |
| Petitioner, | ) | Superior |
| | ) | Court #575868 |
| -vs- | ) | |
| | ) | |
| SANTA CLARA COUNTY SUPERIOR COURT, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |
| PHILIPPINE EXPORT & FOREIGN LOAN, ETC., | ) | |
| | ) | |
| Real Party in Interest. | ) | |

BY THE COURT

The petition for writ of mandate and/or prohibition is denied. The stay previously issued by this court is hereby dissolved.

(Agliano, P.J., Brauer, J., and Bonney, J. (assigned) participated in this decision.)

Dated: September 18, 1986.
(Filed: September 18, 1986)

AGLIANO, P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H002215

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

---

CHUIDIAN, Petitioner

v.

SUPERIOR COURT OF THE COUNTY OF SANTA CLARA, Respondent;
PHILIPPINE EXPERT & FOREIGN LOAN, ETC.
Real Party in Interest

---

Petition for review DENIED.

(Filed: November 12, 1986)

BIRD
Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT
RICHARD J. EYMAN,CLERK

August 13, 1986

Mr. Joseph Russoniello
United States Attorney
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: H002215, Vicente B. Chuidian
v. Superior Court Philippine
Export and Foreign Loan Guarantee
Corp., Real Party in Interest

Dear Mr. Russoniello:

In the above-captioned matter, the petitioner, Mr. Chuidian, was the defendant in an action by the Real Party in Interest, the Philippine Export and Foreign Loan Guarantee Corp. (PEFLGC) to recover loan proceeds that Mr. Chuidian had allegedly misused. The action appeared to end in a negotiated settlement and entry of a stipulated judgment. However, PEFLGC later moved to vacate the judgment and void the settlement agreement on grunds of fraud that allegedly involved, among others, ex-president Marcos.

In the instant matter, Mr. Chuidian seeks a writ to prohibit further proceedings on the motion to vacate, including the depositions of various persons in the Philippines concerning the alleged fraud. Mr. Chuidian claims that

the proceedings are precluded by the Acts of State doctrine, which as a general rule, prohibits inquiry into the acts of foreign states. (See Underhill v. Hernandez (1897) 168 U.S. 250; Banco Nacional de Cuba v. Sabbatino Corp. (1964) 376 U.S. 398; Clayco Petroleum Corp. v. Occidental Petroleum Corp (9th cir. 1983) 712 F.2d 404.) Explaining the doctrine, the Second Cirsuit stated, "If adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the foreign state's act." (Allied Bank Int'l v. Banco Credito Agricola (2nd Cir. 1985) 757 F.2d 516, 521.) And recently, in New York Land Co. v. Republic of Philippines (S.D.N.Y. 1986) 634 F.Supp. 279, 289, the court quoted this language and declined to apply the doctrine because, among other things, it had received no indication from the Department of State that the proceedings would hinder the conduct of foreign policy.

To aid its determination as to the present applicability of the doctrine, the court requests the United States government's position conerning the effect, if any, that inquiry into the circumstances surrounding the Chuidian-PEFLGC settlement agreement and stipulated judgment may have on its foreign relations and ability to conduct its foreign policy. Copies of Mr. Chuidian's petition and PEFLGC'c opposition to a stay are enclosed for you [sic] information and convenience.

At this time further proceedings on PEFLGC's motion to vacate, including discovery, are stayed, and opposition from

PEFLGC on the merits of the writ petition is due August 25, 1986. To expedite this matter, the court requests that you submit your response by that date or notify it as soon as possible if you plan but are unable to submit a response by August 25.

The court appreciates your prompt attention to this matter.

Very truly yours,

RICHARD J. EYMAN,
Clerk of the Court

RJE/lac
cc: James P. Kleinberg, Esq.
Jeffrey Parish, Esq.
Honorable Jack Komar

Enclosures

No. 86-1292

In The
# Supreme Court of the United States
October Term, 1986

VINCENTE B. CHUIDIAN,

*Petitioner,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA,

*Respondent,*

PHILIPPINE EXPORT AND FOREIGN LOAN GUARANTEE CORPORATION, Real Party in Interest

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should the Court review purported act of state issues where:

a. The lower courts in this case have not yet decided the issues;

b. The issues turn on factual determinations that have not and cannot be made because there is no factual record; and

c. The issues sought to be reviewed are settled.

2. Should the Court review the propriety of a state appellate court's request for advice from the State Department on act of state issues when there is no evidence that the State Department ever responded and the state court ultimately declined to consider those issues?

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No. 86-1292

In The
# Supreme Court of the United States
October Term, 1986

VINCENTE B. CHUIDIAN,

*Petitioner,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA,

*Respondent,*

PHILIPPINE EXPORT AND FOREIGN LOAN GUARANTEE CORPORATION, Real Party in Interest

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

Philippine Export and Foreign Loan Guarantee Corporation ("Philguarantee") moved to vacate a stipulated judgment entered by the California Superior Court for Santa Clara County on a settlement procured by fraud. The "opinion" (Pet. at 2) of which petitioner Vincente B. Chuidian seeks review is neither a decision on that motion, nor an adjudication of Chuidian's act of state defense; it is only an order setting a hearing on Philguarantee's motion to vacate. That hearing is currently scheduled for April 7, 1987.

Philguarantee is a Philippine corporation, wholly-owned by the Philippine government, which guarantees loans for economic development in the Philippines. In late 1980, Chuidian and one of his companies, Asian Reliability Co., Inc. ("ARCI"), applied for $25 million in loans, promising to use the loan proceeds for specific projects to develop the Philippine semiconductor industry. Based on that promise, Philguarantee guaranteed the loans. Chuidian did not use the money to develop the Philippine semiconductor industry. Instead, he purchased stock in several Silicon Valley firms. ARCI and Chuidian defaulted on the loans in 1984, and Philguarantee was forced to pay $25 million plus interest on its guarantee.

In May 1985, Philguarantee filed suit against Chuidian in California State Court to recover the $25 million it paid as guarantor on Chuidian's fraudulently procured and illegally diverted loans. Soon after the lawsuit was filed, however, then-President Ferdinand Marcos (through various emissaries) began conducting secret settlement negotiations with Chuidian. Chuidian threatened to reveal evidence damaging to Marcos and his family, and Marcos responded by pressuring Philguarantee to accede to Chuidian's settlement demands.

The settlement agreement gave Chuidian an enormous windfall. It required Philguarantee, the injured party, to (1) guarantee a payment to Chuidian of $5.3 million; (2) release its security interest in over two and a half million shares of stock in the Silicon Valley companies Chuidian had purchased; and (3) give up more than $25 million in claims against Chuidian and the companies he controlled. In "return," in a secret side agreement never filed with the state Court and signed only by Chuidian and Marcos's

personal representative, Chuidian promised to execute an affidavit denying the Marcos family's secret financial involvement in Chuidian's companies and to suppress evidence of it. At Chuidian's insistence, the settlement agreement (but not the secret side agreement) was presented to the California Superior Court, which entered a stipulated judgment on it.

After Marcos was deposed and forced to leave the Philippines in February 1986, Philguarantee moved to reopen the case on the ground that the settlement agreements and stipulated judgment had been procured through illegality, duress and fraud. Chuidian opposed any inquiry into the settlement, asserting among other things that the act of state doctrine barred examination of Marcos's motivation in coercing the agreements. On May 16, 1986, the court set a hearing date in June 1986 to address the motion.

It soon became clear that discovery delays—principally due to the procedural difficulties of issuing letters rogatory and securing deposition subpoenas for third party witnesses in the Philippines—would make a June hearing impossible. Accordingly, Philguarantee requested that the hearing be taken off calendar to allow the necessary discovery.

On June 17, 1986, the parties attended a hearing on Chuidian's motion for writ of execution against Philguarantee based on the stipulated judgment. Philguarantee opposed the writ in part on the ground that the underlying settlement agreements had been wrongfully procured, and sought postponement of execution so that full discovery on the issues could be taken. Chuidian opposed consideration of this evidence on the basis of the act of state doctrine.

The court granted Chuidian's motion for a writ of execution against Philguarantee. The court stated that be-

cause Philguarantee's motion to vacate the stipulated judgment had been taken off calendar, there was no basis for denying the writ. The court made no decision on the act of state issue, noting that "at this point there is nothing before the Court that will permit the Court to enter into that inquiry." (App. A.4) It then rescheduled the hearing on Philguarantee's motion to vacate.[1]

Chuidian did not give the Superior Court an opportunity to address the merits of his act of state defense. On August 6, 1986, he petitioned the State Court of Appeal for various writs and requested an immediate stay of proceedings in the Superior Court.[2] The Court of Appeal granted the stay before receiving Philguarantee's papers. (App. A-1, A-1.2) It then requested advice from the U.S. State Department on the effect that adjudication of this case would have on U.S. foreign policy. (App. B) The Court of Appeal, however, acted on the petition without ever receiving a response from the State Department;[3] after receiving

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1 The hearing has been postponed several times to allow the time necessary for international discovery. The hearing currently is scheduled for April 7, 1987.

2 His writ petition was untimely under the California rule that writ petitions should be filed within the 60-day period that would govern the filing of a notice of appeal if the issue were appealable. *See Reynolds v. Superior Court*, 64 Cal. 372, 373 (1883); *People v. Superior Court (Kizer)*, 155 Cal. App. 3d 932 (1984).

3 Counsel for Philguarantee has checked the files of the Court of Appeal. The only communication from the U.S. government is a letter from William Kanter of the Department of Justice, who wrote that the Solicitor General's office would have to approve any statement and that no statement could be sent within the time period requested by the court. Mr. Kanter said he would let the court know if the U.S. government intended to send a letter. No further communication is in the Court's files.

Philguarantee's papers, the court, without opinion, denied the writ petitions and dissolved the stay. (App. A-2, A-3)

The California Supreme Court denied Chuidian's petition for review on November 12, 1986, also without opinion. Now Chuidian seeks review here.

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## SUMMARY OF ARGUMENT

1. Chuidian asks the Court to review whether the act of state doctrine bars all inquiry into the validity of the settlement agreement upon which the stipulated judgment in this case is based. The Court should refuse to grant review of this issue for two reasons:

a. The Court does not have jurisdiction to review this case now because there has been no "final judgment" (or indeed, any judgment) by the "highest court of [the] state in which a decision could be had" on the act of state issues. 28 U.S.C. § 1257. The "judgment" that Chuidian seeks to have reviewed is, at most, a decision by a trial court to set a hearing at which the act of state defense first will be addressed. That hearing has not yet taken place and neither the decision to set the hearing, nor the appellate courts' refusal to review that interlocutory decision by extraordinary writ, satisfies the jurisdictional requirements of 28 U.S.C. § 1257.

b. Because the California courts have not issued a decision on the act of state issues, there is no conflict between a state court of last resort and decisions of this or other federal courts. In fact, the legal issues he raises are largely settled. The act of state doctrine was created to

preclude interference by the judiciary into U.S. foreign affairs. It applies to bar adjudication only of public acts committed by a sovereign while acting on behalf of the government he is pledged to represent. Where, as here, the sovereign involved no longer is in power and the present administration has consented to adjudication by the U.S. courts, there is no reason to apply the doctrine. Moreover, it is premature to decide the act of state issues because there is no factual record by which a court could determine whether the acts involved are actually acts of state.

2. Chuidian asks the Court to review the propriety of the California Court of Appeal's request for a statement by the U.S. State Department on the effect that "inquiry into the circumstances surrounding the Chuidian-[Philguarantee] settlement and stipulated judgment may have on [the government's] foreign relations and ability to conduct its foreign policy." (App. B.1) The Court should not review this issue for two reasons:

a. There is no justiciable controversy here. The State Department never filed a statement with the Court of Appeal, and the court denied Chuidian's writ petition without ever addressing the merits of the purported act of state issues. Thus, there is nothing to review; Chuidian is simply asking for an advisory opinion on a matter of no consequence.

b. The Court of Appeal's request does not violate the policy concerns on which the act of state doctrine rests. The court merely sought the State Department's guidance on whether the acts in question would undermine U.S. foreign relations. Courts, including this one, often have requested and considered such opinions, recognizing that the

views of the Executive Branch, while relevant, are not dispositive. Thus, the procedure employed would not have impaired judicial independence—even if it had been carried out.

———o———

## REASONS FOR DENYING THE WRIT

### I. THERE IS NO JURISDICTION UNDER SECTION 1257 BECAUSE THE CALIFORNIA COURTS HAVE NOT YET RULED ON THE ISSUES SOUGHT TO BE REVIEWED.

Chuidian invokes the Court's jurisdiction under 28 U.S.C. § 1257(3). That section provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 1257(3). The "opinion" (Pet. at 2) Chuidian wants reviewed is not a "final judgment or decree." The Court therefore has no jurisdiction to consider this case, and Chuidian's Petition should be denied.

To determine whether there is a "final judgment" under Section 1257, "the test is . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not

subject to further review by a state court." *Department of Banking v. Pink,* 317 U.S. 264, 268 (1942); *see also Market Street R.R. Co. v. Railroad Comm'n.,* 324 U.S. 548, 551 (1945) (state court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court"). The finality rule is designed to avoid the "mischief of economic waste and delayed justice," *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973), that results from "piecemeal review." *Flynt v. Ohio,* 451 U.S. 619, 621 (1981). Moreover, "[t]his prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court." *North Dakota Pharmacy,* above, 414 U.S. at 159.

There has been no "final word of the final court" on Chuidian's act of state defense. *Market Street R.R. Comm'n* above, 324 U.S. at 551. Indeed, there has been *no* word of any kind from *any* court on that issue. The June 17 hearing that Chuidian cites as the source of the Superior Court's "opinion" (Pet. at 2) concerned Chuidian's request for a writ of execution. The court granted that writ because there was no basis for denying it. (App. A.5) The court expressly declined to rule on the merits of Philguarantee's motion to vacate or on Chuidian's act of state defense, for they were not before the Court.

> [A]t this point there is nothing before the Court that will permit the Court to enter into [the act of state] inquiry because [Philguarantee has] withdrawn [its] request for relief in connection with the motion to

> set aside the judgment based upon the fraudulent stipulation.

(App. A. 4) The court then set a date for a hearing on the motion and the act of state defense. (App. A.6-A.7)

An order scheduling a hearing to consider an issue is not a decision or judgment on that issue, final or otherwise, but that is all the court did and all there is for this Court to review. Nor do Chuidian's unsuccessful and premature writ petitions change the preliminary character of the lower court's action. If that were the law, the "final judgment" requirement would be written out of Section 1257.

Extraordinary writs are easily filed but rarely granted and the denial of such a writ may reflect only a concern for orderly appellate review rather than any position on the merits. Thus, under California law, review by extraordinary writ is available only when the issues have been decided below and cannot adequately be addressed on appeal at the end of the case. *See, e.g.*, Cal. Civ. Proc. Code §§ 1086, 1103 (writs of mandate and prohibition will only issue "where there is not a plain, speedy, and adequate remedy in the ordinary course of law"); *Randone v. Appellate Department*, 5 Cal. 3d 536, 543 (1971) (mandamus proper where interlocutory decision otherwise unreviewable); *Bank of America v. Superior Court*, 20 Cal. 2d 697, 703 (1942) ("certiorari will not lie if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment"). The more premature the petition or the more effective the appellate option, the less likely it is that a writ will issue. The state appellate courts here did not decide any issue on the

merits. They rendered simple orders declining review by extraordinary writ. Surely that does not convert an order that does nothing but set a hearing date into a "final judgment."

Chuidian seeks premature and piecemeal review. There has not yet been a ruling, nor even any hearing, on his act of state defense.[4] The Court therefore has no jurisdiction to review the case.

## II. THE ACT OF STATE ISSUES THIS CASE PRESENTS ARE NOT UNRESOLVED QUESTIONS OF LAW.

On procedural grounds alone, this Court should deny review. Even if the Superior Court's dicta were construed as a ruling, however, this Court still should not review this case. The issues Chuidian raises are largely settled issues of law and turn on facts that have not yet been developed.

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[4] This case is not within the narrow class of cases in which the finality requirement of Section 1257 may be satisfied before the termination of the action. Chuidian's act of state defense is central to the ongoing proceedings below; it is not a collateral federal question that has been finally adjudicated. *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Construction Laborers v. Curry*, 371 U.S. 542, 549 (1963); *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Chuidian will have a hearing on his defense and a right to appeal from any adverse decision, so denial of review now will not deprive him of a meaningful review later. *Curry*, 371 U.S. at 550. Nor will it effectively dispose of any protected right in the meantime. *Mills v. Alabama*, 384 U.S. 214, 217 (1966); *Abney v. United States*, 431 U.S. 651, 657 (1977). Finally, the scheduling of a hearing to address act of state issues does not threaten to undermine the federal policy embodied by that doctrine. *Flynt v. Ohio*, 451 U.S. 619 (1981); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See* § II.A, below. In sum, to grant review here would be to create an exception to the finality rule that would "swallow the rule." *Flynt v. Ohio*, 451 U.S. at 622.

Sup. Ct. Rule 17.1(c). Nor does the Superior Court's purported "opinion" (Pet. at 2) conflict with any federal law. Sup. Ct. Rule 17.1(b).

### A. A COURT MAY REVIEW THE MOTIVATIONS OF A FOREIGN SOVEREIGN TO DETERMINE WHETHER THE ACT OF STATE DOCTRINE APPLIES.

Chuidian first claims that to determine whether the act of state doctrine applies here, a court must examine the motivations of a foreign sovereign and that this examination itself is precluded by the doctrine. (Pet. at 12) He then maintains that the California courts have ruled contrary to his version of the federal law. (*Id.*) Neither of these arguments is correct.

The California courts have not yet ruled on this issue at all, let alone ruled contrary to federal authority. (Pp. 7-10, above.) And the law is settled that the courts may scrutinize the motivations of the foreign sovereign to see if the challenged acts are actually acts of state. *Restatement (Revised) of Foreign Relations Law* § 469 at 59 (Tent. Draft No. 7, 1986). In *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (*"Sabbatino"*), this Court held that the act of state doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." *See also Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* 549 F.2d 597, 606 (9th Cir. 1976), *citing Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) ("the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government").

Indeed, the law is clear that a court must examine the facts of the foreign sovereign's acts and motives to determine whether denial of the defense would thwart its underlying policy concerns. Thus, the party invoking the defense must prove that the challenged acts were in fact public acts and ratified by the foreign sovereign. *Republic of Philippines v. Marcos,* 806 F.2d 344, 359 (2d Cir. 1986). If the facts suggest they were not, the act of state doctrine does not apply. *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682, 694-95 (1976). Even if the acts are public, a court may decline to apply the doctrine if the foreign government involved is no longer in power or if the foreign state has come into the U.S. courts to seek adjudication of its controversies. *Republic of Philippines,* 806 F.2d at 359. In short, Chuidian's version of how a court may apply the doctrine is dead wrong.

## B. THE ACT OF STATE DOCTRINE DOES NOT APPLY WHERE THE SOVEREIGN ACTS ULTRA VIRES.

Chuidian next urges this Court to grant certiorari to resolve the allegedly undecided question of "when, if at all, the private interest of third parties or personal interest of foreign government officials may render the actions of officials not official acts of state. . . ." (Pet. at 15) This is not an undecided question. To the contrary, it is well settled that where the sovereign acts *ultra vires* the act of state doctrine does not apply. Only when an official acts in an official capacity will judicial review be barred. *Filartiga v. Pena-Irala,* 630 F.2d 876, 889 (2d Cir. 1980) ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's govern-

ment, could properly be characterized as an act of state"); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 & n.11 (5th Cir. 1980); *Jimenez, above,* 311 F.2d at 557-58 (doctrine rejected where chief of state, accused of embezzlement, fraud, and breach of trust, found to have committed crimes in violation of his position, not in pursuance of it); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544-45 (S.D.N.Y. 1984) ("The actions of an official acting outside the scope of his authority as an agent of the state are simply not acts of state. In no sense are such acts designed to give effect to a State's public interests"); *Dominicus Americana Bohio,* above, 473 F. Supp. at 690 ("[E]ven an unrepudiated act of state may be scrutinized by the courts if it resulted from the corruption of government officials").

The doctrine bars adjudication only of formal acts of the foreign government, such as legislative acts, regulatory decrees, or official pronouncements. *Dunhill,* above, 425 U.S. at 706; *Jimenez v. Aristeguieta,* 311 F.2d 547, 557-58 (5th Cir. 1962), *cert. denied sub nom.*, 373 U.S. 914 (1963); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 689 (S.D.N.Y. 1979). In such instances, the official acts with the knowledge and approval of the state he or she is pledged to represent. Another relevant factor is whether the foreign government has ratified or tried to undo the challenged act. *See, e.g., Continental Ore,* above, 370 U.S. at 706-07 (doctrine inapplicable where corporation acted through agent of foreign government but without government's official approval); McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 Yale L.J. 215, 236-37 (1976). Moreover, a private act does not become official

simply because the governmental actor covers his or her tracks with sham documentation. *See, e.g., United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 at 77,456-57 (S.D. N.Y. 1962, *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

The Second Circuit recently reaffirmed these settled principles in a case virtually identical to this one, a case Chuidian conspicuously fails to cite. In *Republic of Philippines*, above, the Second Circuit upheld the district court's refusal to apply the doctrine to preclude judicial review of illegal acts Marcos committed while President of the Philippines. In so doing, it reiterated that for the doctrine to apply, the acts must be public acts of the sovereign. 806 F.2d at 358.

In sum, contrary to Chuidian's claim (Pet. at 15), the legal issues are resolved. Courts may examine the motivations of a sovereign official to determine whether the act of state doctrine should apply. Drawing the distinction between public and private acts may be difficult, but courts have repeatedly done it. *Dunhill*, above, 425 U.S. at 695 ("Distinguishing between the public and governmental acts of sovereign states of the one hand and their private and commercial acts on the other is not a novel approach"). And the guidelines for doing it are clear.

### C. THE RECORD IS INADEQUATE TO DECIDE ANY ACT OF STATE ISSUE.

There is no undecided issue of law here. But even if there were, this is not the right case to review it. To determine whether the act of state doctrine applies, a court must decide whether the acts at issue are in fact acts of

state. This requires a developed factual record, which does not exist here. At the time of the Superior Court's alleged "opinion" (Pet. at 2), no discovery had yet taken place. Indeed, Philguarantee had taken its motion to vacate off calendar because there was not enough time to develop the record before the hearing. Absent a complete factual record, it is impossible to determine whether the fraudulently obtained settlement agreement which Philguarantee seeks to vacate was a public act of the predecessor Philippine regime or effected by Marcos for his personal gain. Because the Court cannot decide Chuidian's motivation issue in a vacuum, it should decline review. *See New York Land Co. v. Republic of Philippines*, 634 F. Supp. 279, 289 (S.D.N.Y.), *aff'd sub nom.*, 806 F.2d 344 (1986) (recognizing that development of further factual evidence was necessary before it could decide whether the act of state doctrine applied).

### D. THE ACT OF STATE DOCTRINE APPLIES ONLY WHERE ADJUDICATION WILL HINDER U.S. FOREIGN RELATIONS.

Chuidian conjures up a parade of horribles to persuade the Court to review this case. He claims that the Superior Court's setting of a hearing will lead to wholesale repudiations by foreign nations of their commercial obligations. (Pet. at 26) And he asks for a ruling "that the act of state doctrine prevents repudiation of foreign debt on political grounds by successor regimes." (Pet. at 29) Chuidian misses the point. Under this Court's rulings, the act of state doctrine only applies when adjudication will hinder U.S. foreign relations or will cause disrespect for foreign states. Chuidian's convoluted analysis misconstrues

this policy, ignores well-established case law, and exaggerates the importance of this case.

The act of state doctrine was created to avoid judicial interference with U.S. foreign affairs. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-66 (1972); *Sabbatino*, above, 376 U.S. at 425. It also was intended to avoid disrespect for foreign governments with the attendant risks of imperiling amicable relations and vexing the peace of nations. *Sabbatino*, above, at 431-32; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 394 (1918). In accordance with this policy, to determine whether the doctrine applies, a court must consider the impact of the adjudication on foreign affairs.

> Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court.

*Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 n.38 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). Where the issue is unlikely to affect our foreign relations, the justification for applying the doctrine is considerably weakened. *Sabbatino*, above, 376 U.S. at 428.

Consistent with these principles, the lower courts have articulated factors that mitigate the need for act of state treatment of even some official acts. There is no dispute about the validity of this analysis, and thus no need for this Court's review.

### 1. There Can Be No Effect on U.S. Foreign Policy Because Marcos Is No Longer President.

In *Sabbatino*, this Court stated that "in its traditional formulation" the act of state doctrine "precludes the courts of the United States from inquiring into the validity of the public acts a *recognized* foreign sovereign committed within its own territory." 376 U.S. at 401 (emphasis added). The Court further indicated that a change of regime may make the act of state doctrine inapplicable:

> The balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered.

*Id.* at 428.

There has been such a change of government in this case. Marcos is no longer the President of the Philippines. and the U.S. no longer has diplomatic relations with him. Moreover, no act of the current Philippine government is at issue. In fact, the present government *supports* the position of Philguarantee challenging the former President. Thus, the political interest of the United States has been "measurably altered," *Sabbatino*, 376 U.S. at 428, and inquiry into Marcos's actions will not affect U.S. relations with the Philippines. The Second Circuit came to this very conclusion only months ago. *See Republic of Philippines*, above, 806 F.2d at 359 ("[T]he danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government.")

Chuidian ignores this case and the settled principles on which it is based. He relies instead on two dated Second Circuit opinions, *Banco de Espana v. Federal Reserve*

*Bank,* 114 F.2d 438 (2d Cir. 1940) and *Bernstein v. Van Heyghen Freres Societe Anonyme,* 163 F.2d 246, 249 (2d Cir.), *cert. denied,* 332 U.S. 772 (1947), which that Circuit in considering this issue expressly disapproved. *Republic of Philippines,* above, 806 F.2d at 359. Thus, the law is settled that where, as here, the sovereign whose acts are challenged no longer presides, the act of state doctrine should not apply. There is therefore no issue that warrants this Court's attention.

**2. There Is No Reason to Invoke the Doctrine Where, As Here, the Foreign Entity Submits to Adjudication by a U.S. Court.**

There is also no reason to apply the act of state doctrine where, as here, the foreign state asks the U.S. courts to scrutinize its actions. Where the government consents to the adjudication, the doctrine should not apply. *See, e.g., Republic of Philippines,* above, 806 F.2d at 359; McManis, 86 Yale L.J. at 235 ("Of course, if the foreign government itself brings the action, the act of state doctrine is an untenable defense, for the government in effect is calling for judicial inquiry").

Here, both Philguarantee and the present Philippine government sought adjudication of their disputes with Chuidian. In so doing, they acknowledged that their actions would be subject to external examination. Philguarantee filed its complaint against Chuidian in May 1985 seeking damages for Chuidian's wrongful conversion of $25 million in loans, and in 1986 filed its motion to vacate the settlement agreements. The Presidential Commission on Good Government, the arm of the current Philippine administration charged with investigating Marcos's corruption, also

has approved judicial review. It requested the Superior Court to extend the time before hearing so that the results of its own investigations into the settlement could be incorporated into the evidence before the court.

Chuidian has cited no controlling contrary authority. In neither *DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), nor *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940), did the existing government initiate the action. Thus, even if the trial court's passing reference to the act of state doctrine is treated as a ruling, it is not contrary to any federal law. Moreover, Chuidian's truncated citation of the Restatement (Pet. at 19) seriously misleads the Court. In a portion omitted by Chuidian, the Restatement says:

> *When a state has expressly subjected certain kinds of obligations to adjudication in the courts* or arbitral tribunals *of another state*, it may be said to have acknowledged that its actions with respect to those obligations take place in the international arena and are subject to international scrutiny, and in such cases *the justification for applying the act of state doctrine is significantly weaker.*

*Restatement (Revised) of Foreign Relations Law* § 469 at 56 (Tent. Draft No. 7, 1986) (emphasis added). There is no need for this Court to articulate a different rationale.

### 3. Refusal to Apply the Doctrine Here Will Not Undermine Twenty Years of Philippine Obligations.

Finally, Chuidian argues that "[t]he public policy interest in the security of international debt, requires articulation in act of state analysis by this Court." (Pet. at 27)

He attempts to aggrandize this case, claiming that if the act of state doctrine is found not to apply, it will invite "wholesale repudiation of foreign debt undertaken by the Marcos government." (Pet. at 24) He even implies that unless the Court intervenes in the Superior Court's decision to set a hearing, other governments owing substantial sums to U.S. interests will ignore their financial obligations. (Pet. at 26)

These contentions are ludicrous. There is no threat to undercut every "debt obligation undertaken by the Marcos government during the more than twenty years of Marcos rule." (Pet. at 25) The present Philippine government has not repudiated any commercial debt here. Rather, this case involves Marcos's relations with one individual, which resulted in a secret, illegal, and fraudulently induced settlement agreement. Thus, there is no reason to believe resolution of this action will affect any commercial obligations between the former Marcos government and U.S. entities. Even if it did, a plurality of this Court already has indicated that the act of state doctrine does *not* apply to commercial debts. *Dunhill*, above, 425 U.S. at 695, 705.[5]

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[5] Nor does this case call for an extension of the act of state doctrine to preclude review of a successor government's efforts to void a financial obligation of a prior administration. (Pet. at 29) Courts can invalidate such actions under the rule of state succession, a substantive principle of international law. That rule should not be extended to bar adjudication at the outset of the issues presented here. Courts should continue to decide these issues by applying the substantive rule, if appropriate, rather than abstaining from reviewing the question altogether under an expanded interpretation of acts of state.

## III. THIS COURT SHOULD NOT RENDER AN ADVISORY OPINION ON THE COURT OF APPEAL'S REQUEST FOR THE VIEWS OF THE STATE DEPARTMENT.

### A. THE COURT OF APPEAL'S ACTION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

Chuidian says that the Court of Appeal acted improperly in requesting the views of the State Department on the effect that adjudication of this case would have on U.S. foreign relations. The court's action was proper. But even if it weren't, nothing ever came of the court's request. Thus, in this Court's words, "One naturally asks, 'So what?' " *Public Service Comm'n v. Wykoff*, 344 U.S. 237, 244 (1952). Despite Chuidian's suggestions to the contrary (Pet. at 30), the Court of Appeal acted before receiving a response from the State Department, and as far as we know, no response ever came. A non-existent response could not have influenced the Court's decision to deny Chuidian's request for extraordinary relief. In short, there is nothing to review.[6]

Because there is no evidence that there ever was a State Department response, Chuidian cannot claim that "the challenged action [here, the Court of Appeal's request for a State Department letter] has caused him injury in fact." *Association of Data Processing Service Orgs.*,

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[6] Chuidian challenges "the procedure employed by the California Court of Appeals," which he says was "validated by the order of the California Supreme Court." (Pet. at 31) This misstates the facts. The so-called "procedure" consisted of a request for advice that never came. Far from "validating" the nonexistent "procedure," the Supreme Court simply denied review without comment.

*Inc. v. Camp,* 397 U.S. 150, 152 (1970). Nor can he say that a favorable decision on this issue will provide him with any meaningful redress. He therefore has no standing to challenge the Court of Appeal's action and review should be denied. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) ("at an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision' ") (citations omitted).

More fundamentally, there is no action to challenge and therefore no "case or controversy." U.S. Const., Art. III.

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts.

*Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41 (1937) (citations omitted); *see also North Carolina v. Rice,* 404 U.S. 244, 246 (1971). Chuidian wants an opinion on whether a Court may ask for the views of the federal government, and the "weight" and "proper procedure to be accorded expressions of opinion by the Executive" (Pet. at 34) once they are received. Where there was no State Department letter, let alone a decision based on it, the

issue is not ripe for adjudication, and the Court will not give an advisory opinion. Even if the Court of Appeal's request for the letter initially presented a justiciable controversy, its denial of the writ without opinion before receiving a response made the issue moot. *See Iron Arrow Honor Society v. Heckler,* 464 U.S. 67 (1983); *Kremens v. Bartley,* 431 U.S. 119 (1977).

There never was a justiciable issue here. If there ever were, it is now moot. There is nothing to review, and Chuidian's petition should be denied.

### B. THE REQUEST ITSELF DOES NOT VIOLATE THE ACT OF STATE DOCTRINE.

According to Chuidian, a court may never request the views of the Executive Branch in reaching a decision that concerns Executive Branch prerogatives. (Pet. at 30-35) If Chuidian were correct, no court could ever seek briefs of amici curiae to clarify act of state (or any other) issues. Chuidian's proposal is absurd on its face.

This Court has approved consideration of the Executive Branch's views in resolving act of state issues. *See, e.g., First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 659, 768 (1972) ("We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts"). The lower courts have followed suit. In *Republic of Philippines,* 806 F.2d at 356-57, 360, for instance, the Second Circuit took into account the State Department's opinion that it would not fear embarrassment if the

U.S. courts adjudicated disputes between the Philippine government and ex-President Marcos before scrutinizing the acts in question. *See also Allied Bank International v. Banco Credito Agricola de Cartago,* 757 F.2d 516 (2d Cir. 1985); *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum,* 577 F.2d 1196, 1204 & n.14 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979) ("it is nonetheless clear that whether the state department believes that judicial action would interfere with its foreign relations is germane to whether a court may decide actions involving foreign relations").

Considering the views of the Executive Branch does no violence to the separation of powers policy on which the act of state doctrine rests. The opinion of the Executive Branch is relevant to act of state issues, though not dispositive. *First National City Bank,* above, 406 U.S. at 773 & n.4 (Douglas J., concurring in result); *id.* at 775-76 (Powell, J., concurring in judgment); *see also Republic of Philippines,* above, 806 F.2d at 358; *Banco Nacional de Cuba v. Chase Manhattan Bank,* 658 F.2d 875, 884 (2d Cir. 1981). As the American Law Institute stated in the *Restatement (Revised) of Foreign Relations Law:*

> It seems that if the State Department issues a letter requesting that the courts not review the validity of a particular act, such a letter will be highly persuasive if not binding . . . . If the State Department issues a letter stating that it has no objection on foreign relations grounds to adjudication of the validity of a given act of a foreign state, U.S. courts will make their own determination as to whether to apply the act of state doctrine, taking the view of the Executive Branch into account but not being bound by it.

§ 469 at 69. Thus, there is no threat that a request for advice will hinder judicial independence in deciding these issues.[7]

In requesting the views of the State Department, the California Court of Appeal did not agree to be bound by the Executive Branch's position. It merely sought the U.S. government's views "[t]o aid its determination" on issues which potentially could implicate U.S. foreign affairs. (App. B-1) As it turned out, the court declined review, so any advice was moot. Even if the advice were relevant, however, the court's action is no different from requesting briefs of amici curiae, a practice recognized and used by this Court. *See, e.g., Iran v. Boeing,* — U.S. —, 106 S. Ct. 2243 (1986) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States"); *Bob Jones University v. United States,* 456 U.S. 922 (1982). In no way does the request for advice require "an abandonment of judicial independence." (Pet. at 33) The court simply seeks guidance from the Executive on the potential threat to foreign relations the case may present.

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[7] Nor, as Chuidian maintains (Pet. at 31), does this Court's decision in *Sabbatino* suggest a different result. There, the Court rejected the suggestion of amici curiae that when the Executive Branch expressly stipulates that it does not wish a court to adjudicate the issues presented, its views should be dispositive. 376 U.S. at 436. It recognized, however, that the opinion of the Executive may be a relevant factor to a court's determination.

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## CONCLUSION

Chuidian wants to bypass the entire state court system and try his act of state defense in this Court in the first instance. This Court does not sit to try cases. Nor does it sit to give advisory opinions. Here there is no developed factual record, nor are there any reasoned decisions by the California courts below. The Court should deny Chuidian's Petition.

Respectfully submitted,

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